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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case Nos. 08-13555 (JMP) ; 08-01420 (JMP) (SIPA)
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In the Matters of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.
- - - - -x
LEHMAN BROTHERS INC.,

Debtor.
- - - - -x
United States Bankruptcy Court
One Bowling Green
New York, New York

November 17, 2010
10:05 AM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

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HEARING re Debtors' Motion for Authorization to Modify Certain
Terms of the Restructuring of the Archstone Credit Facilities

HEARING re Debtors' Presentment of Stipulation, Agreement and
Order Granting State Street Bank and Trust Co. Limited Relief
from the Automatic Stay

HEARING re Motion of Carolyn Fogarazzo, et al. for Relief from
the Automatic Stay

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Be seated, please. Good morning.

MS. MARCUS: Good morning, Your Honor. Jacqueline Marcus, Weil Gotshal & Manges, on behalf of Lehman Brothers Holdings Inc. and its affiliated debtors. The first item on the agenda this morning, Your Honor, is the debtors' motion for authorization to modify certain terms of the restructuring of the Archstone credit facilities, docket number 12475.

Your Honor, as you're probably aware, this is our third time before you with respect to the Archstone restructuring. We were here in January 2009 when we got what we have described as the initial modification order which permitted LCPI and the co-sponsors to provide an additional 485 million in priority financing to Archstone and to extend certain maturity dates.

We were before you again in May 2009 when we sought approval of the comprehensive restructuring which provided for a conversion of approximately 2.5 billion of LCPI debt to preferred equity interest, the conversion of the 485 million in priority financing to a new revolving credit facility and the extension of certain maturity dates.

At the time we got approval of the comprehensive restructuring, we did not yet have agreement on the final terms of the deal and at the hearing, the Court expressed some

1 discomfort with that fact and directed us to err on the side of
2 caution if there were further changes to the terms of the
3 restructuring. It is in large part due to the Court's
4 admonition that we are here before you again today seeking
5 approval of further modifications to the terms that we laid out
6 for the Court and other parties in interest in May. We have
7 made a substantial amount of progress in the negotiations since
8 May and we are close to finalizing the terms of the Archstone
9 restructuring.

10 The changes to the terms of the restructuring are
11 summarized in the motion and are as follows: first and most
12 importantly, the amount of indebtedness that will be converted
13 to preferred equity interest will be increased by 237 million
14 dollars, sixty-five million of which is attributable to LCPI.
15 The other changes are less significant. The post-conversion
16 revolver will be a single tranche or a multi-tranche facility
17 in the discretion of the co-sponsors instead of a two-tranche
18 originally contemplated. And the third change is that there is
19 increased flexibility regarding which entity will be the
20 managing member of Archstone Property Holdings LLC. It is
21 currently contemplating that Archstone Enterprise LP or one of
22 its affiliates, as agreed by the co-sponsors, will be the
23 managing member. And the managing member will be subject to
24 removal by the co-sponsors.

25 The debtors have filed a declaration of Jeffrey Fitts

1 in support of the motion. Mr. Fitz, who is present in court
2 today, is a managing director of Alvarez & Marsal and is the
3 co-head of Lehman's real estate group. As set forth in his
4 declaration, Mr. Fitts believes that the modifications to the
5 restructuring are in the debtors' best interest and provide the
6 best framework for protecting and maximizing the value of the
7 debtors' interests -- investments in Archstone. The changes
8 provide for further de-leveraging of Archstone and, in Mr.
9 Fitts' opinion, are immaterial in the context of the overall
10 restructuring.

11 Although, as indicated, we may have made substantial
12 progress since May 25th in finalizing the terms of the
13 restructuring, the parties have not yet completed all of the
14 documentation related to the restructuring. In order to avoid
15 having to burden this Court again with further motions
16 regarding this matter, the proposed order approving the motion
17 provides, and I quote, "notwithstanding the provisions of the
18 Restructuring Order or this Order, the Transaction Documents
19 may be further modified, amended or supplemented by the parties
20 thereto in accordance with the terms thereof without further
21 order of the Court, provided that, in each case, the Debtors
22 determine, with consent from the Creditors' Committee, that
23 such modification, amendment or supplement has no materially
24 negative effect on the Debtors' claims or interests with
25 respect to Archstone as modified by this Order and the

1 Restructuring."

2 As indicated in the certificate of no objection we
3 filed with respect to the motion, no objections to the motion
4 have been filed. And the creditors' committee has filed a
5 statement in support of the motion. Accordingly, based on the
6 motion and the evidentiary support provided by the Fitts
7 declaration, the debtors request that unless the Court has any
8 questions, the Court enter the proposed order.

9 THE COURT: I have a couple of questions.

10 MS. MARCUS: Sure.

11 THE COURT: One relates to how close we really are to
12 the finish line and what kinds of changes are contemplated or
13 foreseeable. And another has to do with why we're here on an
14 interim step as opposed to coming in to court when everything
15 is absolutely done and you can have one last opportunity for
16 all parties in interest to understand the terms of the
17 transaction and for the Court to have a full and adequate
18 opportunity to review the transaction.

19 MS. MARCUS: Sure.

20 THE COURT: Two questions.

21 MS. MARCUS: Sure. I'll take them in the order that
22 you presented them, Your Honor. First, in terms of how close
23 we are to the finish line, I've been advised that we are very
24 close, that the parties currently contemplate a closing by the
25 current drop dead date which is December 6th, so a little past

1 the November 30th date we had indicated earlier, and that the
2 nature of things that remain open are in the nature of, and I'm
3 quoting here, "nits". Mr. Fitts has advised me that he doesn't
4 expect that the transaction will be final until we're actually
5 at the table signing documents but that all of the substantive
6 terms have been agreed to.

7 As to your second question, the reason that we're her
8 is because the parties had originally set a drop dead date of
9 November 30 and I believe that both Lehman and the other
10 sponsors believe that because of interest rate concerns, it's
11 especially essential that this deal close as soon as possible,
12 and definitely, definitely by December 31.

13 THE COURT: I'd like to hear from the creditors'
14 committee on this.

15 MS. MARCUS: Your Honor, before you do that, just one
16 more thing. We did make a couple of changes to the proposed
17 order after we filed it with the court partly in response to
18 the creditors' committee's comments. And if it's okay with
19 you, I'd like to hand it up to you.

20 THE COURT: Please do. Thank you.

21 MR. O'DONNELL: Good morning, Your Honor. Dennis
22 O'Donnell, Milbank, Tweed, Hadley & McCloy on behalf of the
23 official creditors' committee. Your Honor, on the Archstone
24 transaction and the overall restructuring itself is we
25 indicated back in May the committee has spent a long time

1 looking at and evaluating the original restructuring and
2 looking again at the proposed modifications here which, from
3 our perspective, were always in the mix, something that wasn't
4 agreed to back in May but we knew it might come to this and we
5 had already looked at the possibility of these loans being
6 included in the mix. So we think that the addition of the
7 additional loans in terms of the cutoff loans being also
8 converted is immaterial from our perspective.

9 THE COURT: When you say you're in the mix, are you --
10 you're in the mix as an observer?

11 MR. O'DONNELL: We're in the mix as an observer but
12 with full -- I mean, we have a team from FTI that has weekly
13 meetings with the debtors to discuss all real estate issues and
14 this issue in particular. Archstone, in particular, was the
15 subject of perhaps four or five different meetings between the
16 FAs and -- between A&M and FTI and four or five different
17 subcommittee meetings to discuss the various aspects. There
18 was a lot of back and forth on the overall concept of the
19 conversion here and whether it could be done in a way that was
20 effective and whether the benefits offset any detriment here.
21 That goes back to May.

22 In terms of revisiting it with respect to the most
23 recent modifications, again, that was an issue that was fully
24 discussed with the FAs in both the initially and weekly
25 meetings and thereafter and other meetings. And they conduct

1 their own independent analysis of all aspects of this
2 transaction including the most recent modification.

3 I'm not sure in terms of if the question is are we at
4 the negotiating table, the answer is no. But we're getting
5 real time updates from the negotiating table. There are
6 different levels of cooperation and interaction in this case
7 amongst A&M and the committee's professionals. On the real
8 estate side and particularly with respect to this transaction,
9 I would term the level of cooperation to be extraordinary. And
10 nothing has gotten done without our full buy-in. They've made
11 both A&M and Lehman professionals available to us to answer any
12 of the questions that we had and based on that have gotten
13 comfortable with the transaction as presented.

14 THE COURT: Okay. Thank you. Let me just take a
15 moment to look at the blackline unless you would like to
16 emphasize changes for the record.

17 MS. MARCUS: I think the most important one is on page
18 4. The other ones were really immaterial. One had to do with
19 who was provided with notice and the other was a typographical
20 error. But on page 4 is the one that we made in response to
21 the committee's comments which changes "consultation with the
22 creditors' committee" to "consent from the creditors'
23 committee". It's page 4 of the blackline, the first full
24 paragraph.

25 THE COURT: I see it. Thank you.

1 This is an uncontested matter and so, in a sense, this
2 should be as much of a layup as the matters that were removed
3 from the calendar because no objections were lodged. I would
4 note that some of those matters are actually matters that
5 appear to be of great public interest because they involve the
6 advancement of proceeds under officers and directors liability
7 policy, something that the financial press seems to take a
8 great interest in. But incredibly, not a single party in
9 interest cared to object so that's been removed from the
10 calendar.

11 This item involving Archstone is similarly a highly
12 visible issue of great public interest and it's, in part, for
13 that reason and because the record is clear from hearing to
14 hearing that this is a moving target that I took the position
15 last time that there would be no changes to this restructuring
16 without a further opportunity for notice and hearing.

17 I accept the representation that somebody used the
18 term "nits" -- I'm not sure who that was -- to describe the
19 nature of the remaining issues that have to be resolved before
20 this restructuring transaction can be finalized. I accept that
21 representation with this admonition. I leave it to the
22 professionals, including the creditors' committee, to decide
23 whether or not it's not just a nit but an infestation of nits.
24 And if that occurs -- and in the aggregate, we're talking about
25 changes that are worthy of public attention. In that instance,

1 you should be guided by the same caution that brought you here
2 today and should be renoticing, perhaps on an expedited
3 schedule, for approval the changes to the transaction that have
4 occurred from today to the date of closing.

5 I also note that this is all happening, I understand,
6 with the utmost of good faith and with the extraordinary
7 cooperation mostly between financial advisors for the debtors'
8 estates and for the creditors' committee which is not the same
9 as a public airing of these issues. I recognize that
10 negotiations cannot be conducted effectively in a fishbowl but
11 the results of those negotiations deserve disclosure. For that
12 reason, regardless of whether or not a hearing is required, I
13 believe that some form of public notice should occur prior to
14 or immediately after closing that would give parties who are
15 following this case an opportunity to understand how, if at
16 all, the transaction has changed from today to the date of
17 closing.

18 MS. MARCUS: Do you have any suggestions, Your Honor,
19 for what form that public notice should take?

20 THE COURT: No. I assume that a notice filed on the
21 ECF system which seems to work for notices of hearings and
22 other notices in the case or notices on your website would
23 suffice.

24 MS. MARCUS: Okay. Thank you, Your Honor.

25 THE COURT: I'm not suggesting streaming video.

1 MS. MARCUS: Would you like us to revise the proposed
2 order to request your request or is the transcript sufficient?

3 THE COURT: The transcript is sufficient. I'll simply
4 so order this part of the transcript.

5 MS. MARCUS: Thank you, Your Honor. The next item on
6 the agenda will be handled by my colleague, Damon Meyer.

7 THE COURT: Okay.

8 MR. MEYER: Good morning, Your Honor. For the record,
9 Damon Meyer from Weil Gotshal on behalf of the debtors. Your
10 Honor, on October 25th, we filed a -- on notice of presentment
11 a stipulation. It's docket number 12281. It's between Lehman
12 Brothers Holdings Inc. and Lehman Commercial Paper Inc., on the
13 one hand, and State Street Bank and Trust Company, on the other
14 hand. The stipulation is for the -- to modify the automatic
15 stay for the limited purpose of allowing State Street to
16 exercise remedies with respect to a senior secured loan. There
17 was one objection received to the stipulation. It was from the
18 equity holders for the underlying property. It's LH 1440
19 L.L.C. Your Honor, I can address the merits of the stipulation
20 or if you would like to hear from the objecting parties first,
21 we can proceed that way.

22 THE COURT: Why don't you address the merits of the
23 stipulation? I'll then hear the objection and I'll hear from
24 State Street.

25 MR. MEYER: Certainly, Your Honor. We believe the

1 stipulation is in the best interest of the estate. This Court
2 has found that Lehman's interest in the property is a junior
3 secured interest to State Street's senior secured interest.
4 The stipulation is for the limited purpose of modifying the
5 stay to allow State Street to exercise remedies with respect to
6 its senior interests. The stipulation will allow Lehman to
7 avoid having to spend the time and resources dealing with this
8 junior interest while, at the same time, any funds that are
9 recovered by State Street on account of its senior interest in
10 excess to the senior interest and the cost of the recovery
11 would be remitted to Lehman on account of their junior
12 interest.

13 THE COURT: Does the automatic stay apply here at all?

14 MR. MEYER: Your Honor, I guess that's questionable.
15 Right now, it's an issue as to the underlying property holders
16 have appealed the decisions to who owns the underlying junior
17 loans. I suppose, Your Honor, if the underlying junior loans
18 are owned by Lehman, which we believe they are, State Street
19 believes they are and I believe this Court has found, then it's
20 -- I believe the automatic stay would apply because State
21 Street would be exercising remedies that could affect property
22 of the estate.

23 THE COURT: But not as to the acquisition loan.

24 MR. MEYER: But not as to the acquisition loan, that's
25 correct, Your Honor.

1 THE COURT: And no one takes the position that the
2 automatic stay applies as to the acquisition loan?

3 MR. MEYER: Solely as it relates to the acquisition
4 loan, that's correct, Your Honor.

5 THE COURT: All right. Thank you. I'll hear the
6 objection.

7 MR. LUBELSKY: Thank you, Your Honor. Good morning.
8 Mark Lubelsky for LH 1440. As an initial matter, in what
9 manner is the stipulation in the best interest of Lehman?
10 State Street's own reply makes it clear that Lehman receives
11 absolutely nothing from this stipulation. I believe State
12 Street's reply puts the value of the acquisition loan currently
13 at sixteen million dollars. And State Street's reply makes it
14 clear than any expected recovery is substantially less than
15 that. I believe State Street values the underlying asset
16 somewhere between five and six million dollars. LH 1440 values
17 it substantially lower. This -- if this is in Lehman's best
18 interest because of some potential access recovery, that's,
19 according to State Street's own papers, completely illusory.
20 There is no --

21 THE COURT: Can you ask you a question unrelated to
22 your argument but related to something that you presented to me
23 informally in correspondence earlier this year? You advised
24 that under the terms of the financing arrangements, the
25 individual investors in LH 1440 were exposed to recourse

1 liability if action were taken to contest efforts by the
2 holders of the loan to exercise remedies or to deal with the
3 property at maturity of the loan facility. You're here
4 objecting to a stipulation which is designed to, among other
5 things, facilitate State Street as holder of the acquisition
6 loan's efforts to seek remedies at state law coupled with a
7 spillover of value to the debtors' estates to the extent there
8 is any value that may spill over. If you're able to comment on
9 this, to what extent is your present activity in derogation of
10 limitations within the underlying loan documents? And to what
11 extent, if at all, does it expose investors to potential
12 personal liability?

13 (Pause)

14 MR. LUBELSKY: I'd be hesitant to comment upon that on
15 the record but it's certainly in our interpretation that this
16 act does not trigger recourse liability, that here, we are
17 merely objecting to a lifting of the automatic stay and not
18 contesting the foreclosure in any manner. If the automatic
19 stay is lifted, the overwhelming odds are we would not even put
20 in an answer put in an answer to the foreclosure proceeding for
21 fear of triggering recourse liability.

22 There is, however, the appeal to the district court.
23 Certainly, if it went well for LH 1440 would reset the parties'
24 relationship such that State Street couldn't actually foreclose
25 because there would be a tryable issue of fact as to whether or

1 not State Street was the prior breaching party and whether or
2 not State Street had substantial liability to LH 1440. So this
3 act, we certainly believe, does not trigger recourse but
4 certainly, just about anything beyond this act, I would be
5 scared of.

6 THE COURT: All right. So whether you're right or
7 not, you think you're at the threshold and you haven't crossed
8 it?

9 MR. LUBELSKY: That would be a fair way to put it,
10 Your Honor.

11 THE COURT: All right. As I read your objection, it
12 seemed to be mostly about priority of the acquisition loan
13 relative to the other two loans.

14 MR. LUBELSKY: Your Honor, that was amended and we
15 withdrew that portion of the objection.

16 THE COURT: Oh. Okay. Then what's your objection
17 really about now?

18 MR. LUBELSKY: It's really -- having read the reply
19 papers, one is this provides absolutely no benefit to Lehman
20 whatsoever under, really, any interpretation of events. And
21 two would be, just the appeal has been fully briefed before
22 Judge Swain. The State Street's rights and responsibilities
23 would potentially be substantially different if that appeal was
24 successful with regard to LH 1440 than as they are today. And
25 since LH 1440 really has no ability to contest a foreclosure

1 proceeding whatsoever because of the Bad Boy Act's clauses, not
2 necessarily because of the facts, lifting the stay at this time
3 would really leave Lighthouse without any practical remedy even
4 if they did later prevail upon the appeal.

5 THE COURT: Okay.

6 MR. LUBELSKY: Thank you, Your Honor.

7 THE COURT: I'll hear from State Street.

8 MR. PHELAN: Good morning, Your Honor. Andy Phelan on
9 behalf of State Street. What the borrower's response to the
10 Court's question has revealed is they're trying to do
11 indirectly what they cannot do directly and seek through a stay
12 here or a nonlifting of the stay here to enjoin the foreclosure
13 proceeding that State Street is considering. We should get
14 back to the basics of the Court's first question to Lehman's
15 counsel which is should the -- is there even an automatic stay
16 here. And really, as to the acquisition loan, there is not.
17 The only Lehman interest, which is the purpose of the stay to
18 begin with, is if there is some recovery for Lehman in the
19 foreclosure proceedings. The stipulation addresses that
20 concern to Lehman's satisfaction and clearly, and it states
21 that in the enforcement proceedings if there is any recovery
22 beyond what is owed to State Street, it will be remitted to
23 Lehman. So the basis -- the foundation for there to be a stay
24 does not exist to begin with. And to the extent that there is
25 a tangential or indirect effect on Lehman property, it is

1 addressed.

2 The appeal that 1440 Story has taken -- and the Court
3 is very familiar having twice gone through a complaint, an
4 amended complaint, motion to dismiss and then a renewed motion
5 to dismiss. The effort there is to make State Street
6 responsible for two loans that it never acquired. The appeal
7 is irrelevant to the lifting of the stay for two reasons
8 because it doesn't matter really which way the appeal turns
9 out. If 1440 Story loses the appeal then there should not have
10 been a stay to begin with but there's no bar to lifting the
11 stay. Even if 1440 Story were to prevail on the appeal, which
12 is to establish that there is a disputed issue of fact as to
13 whether Lehman sold to State Street both the building loan and
14 the project loan, that would come back to this Court on remand.
15 And I want the Court to assume that even if that was within the
16 jurisdiction of this Court to hear that State Street borrower
17 dispute, even if the Court were to find that those loans were
18 acquired by State Street then LH 1440 Story has proven too
19 much. It has proven that there should not have been a stay to
20 begin with as to that property. So the appeal itself, the
21 pendency of the appeal, is irrelevant to the issue as to
22 whether the Court should lift the stay or not.

23 The fact that it is fully briefed also is irrelevant.
24 It is pending before Judge Swain. We don't have a hearing
25 date. We don't know for sure whether there will be a hearing.

1 But State Street has now held this loan for over two years.

2 THE COURT: What's happening on December 3rd before
3 Judge Swain?

4 MR. PHELAN: On December 3rd is a status conference, a
5 scheduling conference. And counsel contacted chambers about
6 that through Mr. Lubelsky. And Mr. Lubelsky indicated in a
7 communication to us, and he can correct me if I have this
8 wrong, but that is not being transformed into a hearing and the
9 Court may not even have a hearing on the appeal.

10 THE COURT: Okay.

11 MR. PHELAN: So we're still waiting to see what
12 happens there. But irregardless of the result of that, it
13 should not affect the lifting of the stay. And the Court
14 should also keep in mind that while that may be -- even
15 assuming that there was a hearing on the appeal, on December
16 3rd, we still have the issue of an appeal, potential appeal,
17 for the Second Circuit which would delay things even farther
18 when there shouldn't have been a stay to begin with. And we
19 have the fact that State Street now is exercising its rights in
20 protecting the property, is paying for taxes, for example, on
21 the property while this appeal is pending. There is no basis
22 for an automatic stay. Lehman's property interest is
23 protected. When 1440 Story lost on the motion to dismiss, it
24 did not move for a stay pending appeal. It did not post a
25 bond. So it is not entitled to the relief that it is seeking

1 even assuming that the Court had jurisdiction over the
2 acquisition loan.

3 So for all these reasons, the Court should grant the
4 stipulation and reject the objection that 1440 Story has
5 raised.

6 THE COURT: Okay. Anything more from the debtor?

7 MR. MEYER: Your Honor, the one thing I would like to
8 address is 1440's assertion that there was no benefit to the
9 estate from the stipulation. Your Honor, just because we have
10 a junior interest, there are costs and time and professional
11 fees associated with dealing with every aspect of this estate.
12 And to the extent that we can limit those, that is one of the
13 benefits to the estates. And as Mr. Phelan said, of course,
14 our rights are protected through the stipulation. To the
15 extent value does reach down to Lehman's interest.

16 THE COURT: Okay. Thanks. As the parties have noted,
17 the Court is very familiar with this dispute. There was a
18 certain irony in comments made by counsel for LH 1440 in
19 response to my question concerning the recourse liability
20 associated with the so-called "Bad Boy" guaranty associated
21 with this property. In effect, once State Street proceeds with
22 foreclosure remedies in connection with the acquisition loan,
23 this will turn out to be an uncontested foreclosure because it
24 would be economic suicide for the investors to contest. That's
25 not really before me. That's just economic reality. So the

1 objection lodged by LH 1440 to the current stipulation granting
2 limited relief from the automatic stay is, in effect, the best
3 means by which LH 1440 can protect the property without, at the
4 same time, exposing individual investors to personal liability.

5 When a stipulation is examined for what it says and
6 does, it's a really benign instrument. All it's really doing
7 is saying that to the extent the stay applies, State Street can
8 proceed in respect of the acquisition loan and benefit the
9 estate in connection with the other loans that are junior to
10 the acquisition loan. The objection by LH 1440, which has
11 changed form a little bit during the course of today's
12 argument, is that there's really no benefit to the estate and
13 that, in any event, we should give the district court an
14 opportunity to pay appropriate attention to the pending appeal.
15 As to the no benefit to the estate contention, debtors' counsel
16 has persuasively argued that there is some benefit even in
17 avoiding the costs and expenses of having to deal with this
18 anymore plus the possible contingency, although I think it's
19 highly remote, of economics that may flow to the junior holders
20 following foreclosure. The statements, which I don't take as
21 evidence but simply as random indications of value, would
22 suggest that the property is worth substantially less than the
23 loan and so I doubt very much that anything is going to flow to
24 the debtors' estate as a junior holder of the other loans. But
25 notwithstanding that, there is a statement made of benefit to

1 the estate which I accept.

2 As to the pendency of the appeal of my order from this
3 past summer granting State Street's motion to dismiss the
4 amended complaint, I would be loathe to do anything here that
5 would undermine or collaterally attack in any fashion the
6 district court's ability to effectively grant relief in
7 connection with the appeal. But based upon my understanding of
8 the procedural record and upon review of State Street's reply
9 papers that were submitted very recently, it appears that
10 there's nothing about the pending stipulation that will
11 materially impact or perhaps impact at all the proceedings
12 before Judge Swain. Either Judge Swain will affirm my
13 dismissal of the amended complaint or she will find fault with
14 what I did and either do that in a manner that doesn't lead to
15 remand or do that in a manner that does lead to remand. But
16 regardless of that outcome, that then becomes an active
17 litigation not against the debtors' estates but against State
18 Street in connection with claim liability relating to the
19 overall loan transaction.

20 For that reason, I'm unable to see any reason not to
21 approve the stipulation and agree that, to some extent at
22 least, what LH 1440 is seeking to do here is to cantilever the
23 automatic stay out in its direction and for its benefit. The
24 stay is not intended to benefit LH 1440. It benefits solely
25 the debtor. And the debtor has concluded that to the extent

1 the stay applies at all, and that's a debatable proposition,
2 that they're consenting to limited relief. For that reason,
3 the objection is overruled and the stipulation will be
4 approved.

5 MR. MEYER: Thank you, Your Honor. The next matter on
6 the agenda is going to be handled by my colleague, Sunny Singh.

7 MR. SINGH: Good morning, Your Honor. Sunny Singh,
8 Weil Gotshal & Manges on behalf of the debtors. Your Honor,
9 the next item on the agenda is the motion for relief from the
10 automatic stay by the Fogarazzo plaintiffs. And I'll turn the
11 podium over to the movants first to present their motion.

12 (Pause)

13 MR. TRINKO: I'm coming, Your Honor.

14 (Pause)

15 MR. TRINKO: Your Honor, I'm Curtis Trinko. I'm
16 counsel for the movants who have made a motion for advancement
17 against an insurance policy by modifying the automatic stay.
18 With regard to the underlying claims, they're from a lawsuit
19 pending before Judge Scheindlin in the Southern District of New
20 York. It's a securities fraud matter that was brought against
21 three investment banks, Morgan Stanley, Goldman Sachs and
22 Lehman Brothers, in 2003.

23 We have just recently reached a partial settlement
24 with Morgan Stanley and with Goldman Sachs. We are seeking to
25 proceed against insurance policies that were designated by

1 Lehman Brothers Inc. as covering the claims in the underlying
2 lawsuit. They were part of initial disclosure that was filed
3 in August of 2004. Also, we know that timely notice of the
4 claims were made to the insurance company. Based upon that, we
5 believe that we have the status as third party beneficiary in
6 this suit.

7 As you probably noted from our motion papers, we took
8 pains to describe our entitlement to relief against Lehman
9 Brothers in the underlying lawsuit in terms of the document
10 production that was made before the automatic stay was imposed.
11 There was full document discovery. After the stay was imposed,
12 we proceeded against Goldman Sachs and Morgan Stanley with
13 regard to depositions. We had fifteen merits depositions. We
14 also took the experts that they proffered in preparation for a
15 motion for summary judgment. And we also had our expert
16 deposed.

17 We seek this relief because this is the only
18 alternative that we have at this point is to go against these
19 liability policies and to seek a recovery. In the
20 underlying -- is it possible I can get some water?

21 THE COURT: You want to drink the Court's water?

22 MR. TRINKO: Absolutely, Your Honor.

23 THE COURT: Sure. We can get you a glass of water.

24 Just stay there.

25 MR. TRINKO: Thank you.

1 In 2002, Your Honor --

2 THE COURT: That's the first time incidentally that
3 request has ever been made.

4 MR. TRINKO: Really?

5 THE COURT: Yes. You're the first person to ever ask
6 to drink our water.

7 (Pause)

8 MR. TRINKO: Thank you. In 2002, Your Honor, there
9 were proceedings brought against the various investment banks
10 one of them being Lehman Brothers Inc.

11 THE COURT: I read the papers --

12 MR. TRINKO: Okay.

13 THE COURT: -- and I'm generally familiar with the --

14 MR. TRINKO: The analyst proceeding.

15 THE COURT: No. I understand that this relates to
16 RSL. I understand that you had lots of discovery. I read your
17 papers and that you have a partial settlement. I'm not
18 understanding why you're spending the time to do this here now.
19 And it's also not entirely clear to me why, if, in fact, this
20 underlying policy was terminated and releases exchanged, you
21 consider it to be worth your time to be seeking stay relief.
22 Or, if it's true, how you could be entitled to stay relief.
23 That's one question.

24 Another question is the cart before the horse
25 question. You're seeking relief from the automatic stay in the

1 LBHI bankruptcy case as it relates to claims that were
2 presented many years ago in district court against Lehman
3 Brothers Inc. Lehman Brothers Inc. is a party to a SIPA
4 liquidation proceeding which is actually part of my regular
5 omnibus docket. But no motion for relief from stay has been
6 brought in the SIPA case. Instead, you're seeking relief from
7 stay in what I view as a highly questionable manner in this
8 case. So I'd like to give you an opportunity not to talk about
9 what a good case you might have but why you're entitled to stay
10 relief here.

11 MR. TRINKO: Yes, Your Honor. We had discussions with
12 both Weil Gotshal and Hughes Hubbard with regard to where the
13 motion should have been brought. Since the insurance policies
14 were issued to Holdings and covering their subsidiaries, it was
15 believed that this would be the most appropriate forum rather
16 than the liquidation proceedings regarding LBI. I don't
17 profess to be a bankruptcy expert on that issue, Your Honor,
18 but we did raise it and it was decided among counsel that this
19 would be most appropriate. So that's why we chose the Holdings
20 proceeding to go in. We certainly can also file it in the
21 liquidation proceeding if Your Honor would feel that's more
22 appropriate.

23 THE COURT: Well, I have no idea what the right
24 approach is and I don't practice law anymore. So you'd have to
25 do that on your own.

1 MR. TRINKO: Yes.

2 THE COURT: But it seems to me that in the ordinary
3 course of relief from stay litigation, having the rights to
4 pursue claims against an insurance policy is not even halfway
5 there because the rights as to the insurance policy are
6 derivative whatever rights you have against the insured.

7 MR. TRINKO: Well, Your Honor, I thought long and hard
8 about that. Obviously, if it were so that one had to get a
9 judgment against the party before one could proceed against the
10 insurance company, all litigation in America would grind to a
11 halt.

12 THE COURT: I don't think that's true. I think you
13 just stated too much. All litigation would not grind to a
14 halt. Maybe plaintiffs' litigation would.

15 MR. TRINKO: Plaintiffs' litigation, okay, Your Honor.

16 THE COURT: The issue is how you pursue a claim
17 against insurance proceeds as to a policy that, at least it has
18 been represented to the Court, is no longer in full force and
19 effect; and, secondly, how you're able to deal with that policy
20 without going at least through LBI.

21 MR. TRINKO: Your Honor, as to the first issue, there
22 were representations made that was -- the first time we heard
23 these representations were in August of this year, Your Honor,
24 that the policies had been terminated and releases issued in
25 the year 2004. As I indicated, in August of 2004, initial

1 disclosures were served by Paul Weiss on behalf of LBI and
2 indicated there that the insurance policy was the appropriate
3 avenue of recovery if we obtained relief against LBI.

4 We have requested on numerous occasions for
5 documentation or some backup to these assertions that there
6 were policy terminations and releases. We have received
7 nothing. We haven't even received the excess policy which we
8 requested because we were only given the primary policy. And
9 so that, we're not even sure if these terminations and releases
10 in fact exist or if, in fact, are possessed by Weil Gotshal
11 and/or Hughes Hubbard.

12 It also, Your Honor -- in thirty-five years
13 experience, I've never seen an investment bank do this with
14 regard to its coverage and go naked. There is no reason that
15 would be done other than some kind of transaction that
16 benefited individuals rather than the institution. And that
17 may be a reason why documents are not forthcoming. But the
18 fact is, Your Honor, that there could be no termination made
19 with regard to terminations or releases on these policies
20 without some form of evidence being presented that they, in
21 fact, exist and, in fact, are appropriate and viable and, if
22 not, then procured by fraud or something else.

23 We have third party beneficiary rights. The insurance
24 company was on notice of that. And regardless of that fact,
25 they supposedly went forward and terminated the policy with

1 existing proceeds still available.

2 THE COURT: I believe it is disputed that you have
3 third part beneficiary rights if I read correctly what Lloyds
4 said in their papers.

5 MR. TRINKO: I acknowledge that, Your Honor.

6 THE COURT: Okay.

7 MR. TRINKO: I'm giving my side of the story.

8 THE COURT: You're welcome to do -- that's why you're
9 here. We believe that we do have third party beneficiary
10 rights and that it's appropriate for us to advance against the
11 policy. We have no other option with regard to claims against
12 LBI.

13 We did file -- and there was a mistake in the
14 unofficial -- or the official creditors' committee's
15 submission. We did file proofs of claim in a timely manner
16 both against Holdings and LBI. But as Your Honor knows,
17 shareholders are the lowest priority. And after doing this
18 dozens of times, we've never recovered in a bankruptcy
19 proceeding through a proof of claim. But we did file them,
20 Your Honor.

21 THE COURT: Wait. You're not pursuing this on behalf
22 of shareholders of LBI or shareholders of --

23 MR. TRINKO: No, we're not, Your Honor.

24 THE COURT: -- LBHI. You're pursuing this on behalf
25 of investors in RSL, isn't that right?

1 MR. TRINKO: Yes, Your Honor.

2 THE COURT: Okay. And you're saying that on behalf of
3 investors in RSL, the class represented by Lawrence --

4 MR. TRINKO: Lawrence Fogarazzo --

5 THE COURT: Fogarazzo --

6 MR. TRINKO: -- Carolyn Fogarazzo --

7 THE COURT: -- and others that you have filed proofs
8 of claim in both the LBI and in the LBHI cases?

9 MR. TRINKO: Yes, I have, Your Honor.

10 THE COURT: All right.

11 MR. TRINKO: Now, with regard to these insurance
12 policies, we believe they cover these types of claims. They
13 were procured by Lehman for their protection against claims,
14 such as securities fraud, to cover employees of Lehman.

15 THE COURT: Okay. I --

16 MR. TRINKO: It's not a directors and officers
17 liability policy.

18 THE COURT: I don't -- I understand the word crime is
19 in the policy name. The focus here has to be why you're
20 entitled to stay relief under the Sonnax standard, something
21 that you belatedly address in your reply papers. You've
22 already said you're not a bankruptcy practitioner. The focus
23 here, however, has to be Sonnax not whether or not you are
24 sympathetic as a plaintiffs' lawyer.

25 MR. TRINKO: They focused on three of the Sonnax

1 factors, Your Honor. We felt that in our reply papers we
2 adequately responded to those by showing that there's no
3 judicial economy to be garnered from a denial of our relief
4 because we're seeking to go solely against the insurance
5 policy. We're not meaning to involve LBI or Holdings in this
6 process. And that, at this point, perhaps we would ask for
7 documents with regard to these terminations of releases. But
8 there really are few depositions that need to be taken. They
9 know who the people are because we made deposition notices in
10 the underlying proceeding before they went into bankruptcy.

11 THE COURT: Let me ask you a question. If you were
12 satisfied based upon a review subject to any appropriate
13 confidentiality restrictions that might be requested of
14 documents demonstrating that the policy as to which you seek to
15 obtain potential recovery in fact was terminated some number of
16 years ago and that releases were exchanged in connection with a
17 transaction that's not subject to credible challenge, do you go
18 away?

19 MR. TRINKO: If those documents were produced to us
20 and with the caveat that it was an appropriate corporate
21 transaction at the time, it was not for some personal benefit
22 but it was for the benefit of LBI, and we reviewed those
23 documents in confidence, I would be willing to stipulate to a
24 dismissal of our proceeding of that event.

25 THE COURT: When you say a dismissal of your

1 proceeding, are you talking about the litigation against LBI
2 which has not been settled currently pending before Judge
3 Scheindlin?

4 MR. TRINKO: All the way through, Your Honor, yes.

5 THE COURT: All right. Let me find out from counsel
6 for the underwriters whether or not this can be resolved with
7 some targeted cooperative discovery.

8 MR. KIRK: Good morning, Your Honor. Edward Kirk from
9 Clyde & Co. for Underwriters at Lloyds & Companies. Your
10 Honor, these policies -- I think you understand the issues
11 quite well. These policies were issued in 1999 to Lehman
12 Brothers Holdings Inc. and its subsidiaries and certain
13 employees and officers of the company with respect to claims
14 for coverage related to professional liability acts, et cetera.
15 But the important thing with regard to the policies is that
16 they're indemnity policies. And there's nothing in the
17 policies that indicate at all that any third party would be a
18 beneficiary under the policies. In fact, the policies would
19 indemnify Lehman Brother and those identified as insureds for
20 certain losses and defense costs. But there's no obligation by
21 Underwriters to make any payment directed to plaintiffs or
22 anything in that nature. And certainly, the Fogarazzo
23 plaintiffs and any other third party plaintiffs are not
24 identified in the policies and there's no indication at all
25 that these are anything other than indemnity policies. So they

1 do not have standing as third party beneficiaries.

2 The other important point to take away, and it's quite
3 simple, is that even if they were third party beneficiaries,
4 they have absolutely no further rights under the policies than
5 the insureds would. And here, it's not disputed by the
6 insureds themselves that the policies were, in fact, terminated
7 and a full release was provided to Underwriters in 2004. This
8 was six years ago. Now the plaintiffs have come forward two
9 years after Lehman Brothers went into bankruptcy and the stay
10 was put in place. And they're now asking for the Court to lift
11 the stay so that they can determine whether or not they can get
12 further proceeds with respect to Lehman Brothers. But what
13 they're trying to do is essentially get around a release -- a
14 settlement agreement and release entered into between two
15 parties relating to that they have no affiliation relating to
16 policies that they're not parties to.

17 So they have absolutely no standing at all under the
18 policies and have absolutely no right to lift the stay. And
19 any lifting of the stay here would be futile and academic as
20 Lehman Brothers just pointed out.

21 THE COURT: Okay. But about this discovery that I
22 mentioned before you stood up, I recognize your legal position
23 which is that these plaintiffs have no direct standing as third
24 party beneficiaries to be seeking anything from you.

25 MR. KIRK: That's correct.

1 THE COURT: But I also recognize that there is the
2 potential for litigation to proliferate here. It could go
3 away, too, for that matter, but it could also proliferate in
4 the sense of a motion for stay relief in the LBI case, an
5 appeal from an adverse determination of this Court concerning
6 the request for stay relief. And this can become vexatious.
7 My question to you is whether, as a means to allow this to go
8 away quietly, Underwriters would provide information to
9 plaintiffs' counsel that would prove the point made in the
10 papers filed in connection with this pending contested matter,
11 namely, that there's no insurance in effect any longer and that
12 there hasn't been insurance in effect for six years.

13 MR. KIRK: Your Honor, just to explain, the settlement
14 of the policies related to other claims involving other
15 parties. We also have a confidentiality provision in those
16 agreements and there is some concern that providing those
17 releases to the plaintiffs --

18 THE COURT: That's what redacting is for.

19 MR. KIRK: Okay. I think we might be able to agree to
20 it if we could redact certain portions of it. And I think we
21 would be willing to show them the release which would confirm
22 that, in fact, we did get a full release and that the release
23 was specific to the Fogarazzo action among others.

24 THE COURT: Okay.

25 MR. KIRK: We could agree to that.

1 THE COURT: So it's --

2 MR. KIRK: -- although I have to note that I am
3 somewhat concerned that providing those releases to the
4 plaintiffs would actually encourage them to continue on with
5 their proliferation of litigation and result in more
6 unnecessary motion practice. He's already indicated that he
7 may go away but only if he considers the settlement to be a
8 proper corporate transaction. So I see a real risk there, Your
9 Honor.

10 THE COURT: Well, at some point, if it isn't
11 productive, lawyers tend to go away. I suggest that the --
12 first of all, I want to hear from counsel for LBI on this, too.
13 I recognize that LBI did not file any papers; at least I didn't
14 see any. But I'd be interested in knowing whether the trustee
15 in the LBI SIPA proceeding has any position whatsoever to
16 express in connection with the pending motion for stay relief.

17 MS. CAVE: Good morning, Your Honor. Sarah Cave from
18 Hughes Hubbard on behalf of the SIPA trustee. And as far as
19 our position on the motion, I think we have -- our interests
20 are aligned with the LBHI debtors in terms of wanting to
21 resolve this as efficiently as possible. If the Underwriters
22 and the LBHI debtors are amenable to the proposal that Your
23 Honor had regarding providing the limited amount of discovery
24 regarding the redacted releases, we would have no objection to
25 that. As Mr. Trinko said, he has filed on behalf of the

1 plaintiffs whom he represents. He's filed a claim in the LBI
2 proceeding. And to the extent that he is entitled to any
3 recovery on that with respect to those claims, it will be dealt
4 in the course of our claims process.

5 The stay is in effect as to the litigation in front of
6 Judge Scheindlin. We have no -- we don't contemplate any --
7 seeking to litigate that proceeding at any time soon. And I
8 would just also note that we've been dealing with Mr. Trinko
9 for a number of months. He initially tried to re -- in our
10 view, sort of get around the stay by refileing his securities
11 complaint as an adversary proceeding --

12 THE COURT: Can I stop you for one second? I'm
13 talking now to the people who are on CourtCall. I don't know
14 who you are but please mute your phones. You're coming through
15 on our loudspeakers. I'm sorry.

16 MS. CAVE: That's okay. So Mr. Trinko had refiled his
17 complaint as a purported adversary proceeding and we
18 immediately dealt with Mr. Trinko in terms of pointing out to
19 him how that was not a proper adversary proceeding. And
20 ultimately, after a number of months, Mr. Trinko did withdraw
21 that adversary complaint. But it's our view that certainly Mr.
22 Trinko has been tenacious as far as attempting to recover on
23 behalf of his clients. But the fact is that LBI is in
24 bankruptcy and he has filed a proof of claim in our proceeding
25 and it will be dealt with in due course in that regard.

1 THE COURT: To the extent that what we're dealing with
2 here is an indemnity policy and accepting for a moment the
3 assertion made by Underwriter's counsel that there are no third
4 party beneficiary rights to pursue, what would the trustee's
5 position be in the event that Mr. Trinko, on behalf of his
6 class, were to seek relief from the automatic stay in the LBI
7 case to pursue litigation before Judge Scheindlin solely in
8 respect of available insurance policy proceeds, if any?

9 MS. CAVE: Well, I would need to discuss that with my
10 colleagues. As Your Honor is aware from other situations in
11 this case, we have agreed to limited lifting of the stay. To
12 the extent that the only relief that's being sought is as to
13 the policies, to the extent that the insurers are the ones who
14 are covering the defense costs of that, so with the caveat that
15 assuming that it would proceed along the lines with which we
16 have done this in similar situations, as long as there is not
17 going to be any additional imposition on the LBI estate from
18 such relief, I think we would consider that in all
19 reasonableness.

20 THE COURT: Okay. Thank you. I think this is
21 probably more complicated than it needs to be and that while I
22 recognize that it is possible that Mr. Trinko, who has been
23 described as tenacious -- you might as well accept that as a
24 compliment. I'm not sure that it's intended as such --

25 MR. TRINKO: I will, Your Honor.

1 THE COURT: Okay. That he may or may not go away as a
2 thorn in the side of the parties in this proceeding. But it
3 seems to me that it is reasonable for him to at least be in a
4 position to exercise duties owed to his client class to assure
5 himself that what has been represented in the papers filed to
6 date in fact is true. That's not to say that anybody would say
7 anything in papers filed that wouldn't be true. But I think
8 the saying is trust but verify. And I believe that it makes
9 some sense for Mr. Trinko to gain access within an appropriate
10 setting of confidentiality to those documents that would
11 support the contention of Underwriters that the applicable
12 insurance policy, in fact, has been terminated and that
13 releases have been exchanged.

14 So I'm going to deny the pending motion for stay
15 relief without prejudice with the understanding that the
16 parties will work cooperatively with one another to provide Mr.
17 Trinko with such documentation as he might reasonably need in
18 order to determine that coverage no longer exists. I presume
19 that Mr. Trinko will be reasonable upon reviewing such
20 documents. I'm assuming that there are narrow credible
21 challenges to be made to such documentation that he'll be able
22 to assure himself and, ultimately, his client class that
23 pursuing claims in the litigation in order to get insurance
24 proceeds would be a waste of time. If he has a different point
25 of view, he's obviously free to assert that.

1 MR. TRINKO: Your Honor, I certainly think that's a
2 reasonable suggestion. I would just be somewhat concerned,
3 though, about the level of redaction that would be undertaken.
4 If we have a confidentiality stipulation, there's virtually no
5 need for redaction. I have looked at --

6 THE COURT: Well, I'm not getting into that level of
7 detail. We're now talking about something that's entirely
8 unrelated to your motion. And you're anticipating a problem
9 that may never exist.

10 MR. TRINKO: Okay.

11 THE COURT: If it becomes a problem, I suppose that's
12 something that you can discuss with counsel. I'll tell you,
13 however, that discovery disputes relating to redaction are
14 unlikely to get my attention.

15 MR. TRINKO: Okay. But I really appreciate the
16 Court's suggestion as far as a way of resolving this matter.
17 And we will cooperate in good faith with counsel to provide a
18 process for documents to be provided to us for our review --

19 THE COURT: Okay.

20 MR. TRINKO: -- on this issue.

21 THE COURT: Fine. Very good.

22 MR. TRINKO: Thank you, Your Honor.

23 THE COURT: And I would ask that debtors' counsel
24 submit an order in reference to this particular motion for stay
25 relief that reflects the statements made on the record today.

1 MR. MEYER: Yes, Your Honor.

2 MS. MARCUS: Your Honor, that brings us to the end of
3 the LBHI part of the calendar. There's nothing else.

4 THE COURT: Before we move on, I just wanted to
5 express a preference of the Court for the next omnibus hearing
6 or perhaps the one after the next omnibus hearing depending
7 upon what makes the most sense. And that has to do with the
8 plan process. Today's omnibus hearing is noticeably lacking in
9 any matters that provide any illumination at all as to how this
10 case is progressing on an overall basis. We're approaching the
11 end of the year. And I am mindful of the statements made by
12 Mr. Marsal at the state of the estate report on September 22 in
13 which he suggested, aspirationally, no doubt, that a plan might
14 be forthcoming to be confirmed before the end of the first
15 quarter of 2011. I'd like to know what progress is being made,
16 what problems, if any, exist with respect to the successful
17 formulation of a consensual plan and what, if any, protocols of
18 communication among and between creditor constituencies that
19 are not presently in place may be necessary or appropriate to
20 facilitate the plan process. I'm not saying that needs to
21 happen in December. And I'm not trying to ruin anybody's
22 holidays. But I do think that some progress report of a public
23 nature is appropriate.

24 MS. MARCUS: That's fine, Your Honor. And I'll
25 consult with my colleagues as to whether the December hearing

1 is the right time or we should do it in the hearing after that.

2 THE COURT: Fine. Thank you.

3 MS. MARCUS: Thank you, Your Honor. I think that
4 concludes our hearing for today.

5 THE COURT: Is there anything on the LBI case?

6 MR. MARGOLIN: No, Your Honor. We filed a --

7 THE COURT: Certificate of no objection?

8 MR. MARGOLIN: -- certificate of no objection.

9 THE COURT: Okay. We're adjourned then until 2:00 for
10 the adversary docket.

11 (Whereupon these proceedings were concluded at 11:14 a.m.)
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I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Debtors' motion for authorization to modify certain terms of the restructuring of the Archstone credit facilities granted as Uncontested; transcript so ordered as to Court's direction to parties to provide public notice of changes to transaction between date of hearing and closing	14	2
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB
AAERT Certified Electronic Transcriber (CET**D-486)

Veritext
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Date: November 18, 2010